



TRANSMITTAL OF APPEAL BRIEF

Docket No.
29953-215594

In re Application of: Semersky et al.

Application No.
10/800,566-Conf. #9823

Filing Date
March 15, 2004

Examiner
C. R. Harmon

Group Art Unit
3721

Invention: PASTEURIZABLE WIDE-MOUTH CONTAINER

TO THE COMMISSIONER OF PATENTS:

Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal filed: May 10, 2006.

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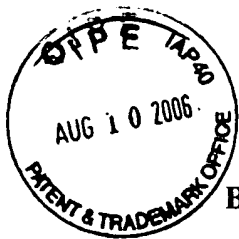
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Dated: August 10, 2006

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re application of: Frank Semersky et al.

Application No.: 10/800,566

Confirmation No.: 9823

Filed: March 15, 2004

For: PASTEURIZABLE WIDE-
MOUTH CONTAINER

Art Unit: 3721

Examiner: Christopher R. Harmon

Atty. Docket No.: 29953-215594

Customer No. **26694**
PATENT TRADEMARK OFFICE

APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, Va. 22313-1450

Dear Sir:

In response to the Notice of Panel Decision from Pre-Appeal Brief Review dated June 1, 2006, Appellants submit the present Appeal Brief.

This is an appeal to the Board of Patent Appeals and Interferences from the final Office Action of January 11, 2006. Please charge our deposit account no. 22-0261 for the \$500 Appeal Brief Fee.

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(1) REAL PARTY IN INTEREST

The Assignee of this Application, and thus the real party of interest in this Appeal, is Graham Packaging Company, L.P., having a business address at 2401 Pleasant Valley Road, York, Pennsylvania, 17402.

(2) RELATED APPEAL AND INTERFERENCES

No appeal or interference is known to Appellants, the Appellants' legal representative, or the Assignee which would directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) STATUS OF CLAIMS

The Application was filed with a Preliminary Amendment canceling claims 1-2 and adding claims 9-19.

Claims 3 and 9 were amended and claims 20 and 21 were added by the Amendment filed October 24, 2005.

Claims 3-21 were finally rejected under both 35 U.S.C. § 102(e) and 35 U.S.C. § 103(a) by the Office Action dated January 11, 2006. The rejection under 35 U.S.C. § 102(e) was withdrawn by the Advisory Action dated March 22, 2006. As a result, claims 3-21 stand finally rejected under only 35 U.S.C. § 103(a) and are appealed as set forth in the Appendix to this brief.

(4) STATUS OF AMENDMENTS

A Request for Reconsideration was filed in response to the January 11, 2006 final Office Action. The Examiner issued an Advisory Action on March 22, 2006 indicating that the Request

for Reconsideration had been considered, but did not place the application into condition for allowance. No claim amendments were filed after the final rejection.

(5) SUMMARY OF THE CLAIMED INVENTION

The invention of independent claim 3 and dependent claims 4-8 and 20 is an energy-efficient method of packaging a food product using a wide-mouth, pasteurizable, blow molded container. Container 10 as described throughout Appellants' specification and drawings is an example of this container. The method includes selecting a PET plastic container (10) having a sidewall (11) with a plurality of peripheral vertically-spaced grooves (11d), a dome (12) located above said sidewall (11) having a blown, wide-mouth opening (12a) adapted to receive a sealed closure, a footed base (13) below said sidewall (11), an upper label bumper (15) extending around the upper end (11a) of said sidewall (11) subjacent said dome (12), and a lower label bumper (16) extending around the lower end (11b) of said sidewall (11) superadjacent said base (13). The method further includes hot-filling the container (10) with a food product, capping the filled container (10), heating the filled and capped container for a time at a temperature sufficient to pasteurize the food product, and cooling the pasteurized filled and capped container (10) to ambient temperature.

In claim 6, the filled and capped container (10) is heated to a temperature in a range of at least about 190 - 210° F for a period in a range of 5-20 minutes (Appellants' specification, page 5, lines 26-29).

In claim 20, the diameter of the wide mouth opening is at least about 80% of a diameter of a cross-section of the container at the sidewall. (See Appellants' specification, page 5, lines 20-23 and Figure 1.)

The invention of claims 9-19 and 21 is directed to a method of packaging a volatile food product that requires pasteurization at elevated temperatures after the food product is packaged in a container that has been filled and capped. The method includes hot filling a blow molded plastic container with the volatile food product at a temperature of at least 180° F (Appellants' specification, page 6, lines 31-33), the sidewall (11) being stiffened against distortion (Appellants' specification, page 3, lines 3-6). The container has a dome (12) above the sidewall (11) with an opening (12a) adapted to receive a sealed closure, a base (13) below the sidewall, upper label bumper (15) extending around the upper end of the sidewall (11) subjacent to the dome (12), and a lower label bumper (16) extending around a lower end of the sidewall (11) superadjacent the base (13). The method further includes capping the container (10) immediately after hot-filling, and heating the container and volatile food product after capping to a temperature in a range of at least 190-210° F for a time sufficient to pasteurize the food product without subjecting the base to undesirable distortion (Appellants' specification page 5, line 35 to page 6, line 2). The method includes cooling the container and volatile food product after the heating step to ambient temperature.

In claim 10, the base (13) is a pressure-resistant footed base that withstands super-baric pressures experienced within the container after the container is hot-filled, capped and heated. The base also withstands a swing from super-baric to sub-baric pressures experienced within the container as the volatile food product cools to ambient temperature. (See Appellants' specification, page 6, lines 3-9 and the lowermost portions of Figures 1 and 5.)

In claim 12, the sidewall includes a plurality of vertically-spaced, circumferentially extending, inset grooves (11d) that are equally spaced and enable the sidewall (11) to accommodate, without undesirable distortion, super-baric pressures experienced within the container during the

heating step, and a swing from super-baric pressures to sub-baric pressures experienced within the container as the volatile food product cools to ambient temperature. (See Appellants' specification, page 4, line 3 to page 5, line 5.)

(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection for review are as follows:

Whether claims 3-21 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. 5,887,739 to Prevot (Prevot) in view of U.S. 5,908,128 to Krishnakumar (Krishnakumar).

(7) ARGUMENT

Claims 3-21 are improperly rejected under 35 U.S.C. § 103(a) as being unpatentable over Prevot in view of to Krishnakumar.

The Examiner's Position

The Office Action rejected present claims 3-21 as unpatentable over Prevot in view of Krishnakumar for the reasons set forth in pages 3-4 of the Office Action of January 11, 2006 and in the Advisory Action of March 22, 2006. The Office Action admits that neither Prevot nor Krishnakumar disclose all the elements of Appellants' claims, but asserts that "it would have been obvious . . . to provide Prevot with vertical grooves and a footed base as well as the crystallinity as claimed as taught by Krishnakumar et al. to withstand pasteurization with a plastic container." (Office Action of January 11, 2006, page 3, paragraph 4.)

A. Argument for claims 3-5, 7-8

1. The Office Action fails to set forth a prima facie case for obviousness

a. No motivation to combine Prevot with Krishnakumar

In order to satisfy a prima facie case for obviousness there must be some suggestion or motivation to combine the references. The teaching or suggestion to make the claimed combination must be found in the prior art, not in applicant's disclosure. (MPEP, § 2143, citing *In re Vaeck*, 947 F.2d 488, 20 USPQ 2d 1438 (Fed. Cir. 1991)). Prevot discloses a dome for a wide-mouth plastic container that can withstand pressure from top loading without distortion. Prevot, at most, discloses that the dome can be suitable for hot fill processing. Prevot fails to disclose that the dome is suitable for pasteurization. Additionally, there is no teaching to other aspects of a container, such as a sidewall or base. Accordingly, Prevot fails to disclose a sidewall having a plurality of peripheral, vertically-spaced grooves, a footed base and upper and lower label bumpers

Krishnakumar discloses a non wide-mouth container that is claimed to be suitable to pasteurization, having hoop ribs in land areas above and below the panels and in the upper section of the container. Thus, Krishnakumar fails to disclose, teach, or suggest a wide-mouth container. There is nothing in the references themselves that suggest the combination of Prevot and Krishnakumar. Furthermore, one of ordinary skill in the art would not be motivated to combine a reference directed to a wide-mouth container dome having an increased top load capacity with a reference directed to a non wide-mouth, pasteurizable container. The Advisory Action states that both references are directed to increasing [top] load capability, but there is no such disclosure in Krishnakumar. Again, Krishnakumar is concerned with accommodating pressure changes that occur in non wide-mouth containers during pasteurization.

It is respectfully submitted that the Action is using Appellants' disclosure as the source of motivation for the combination, and that this use amounts to an impermissible hindsight bias. "Determination of obviousness cannot be based on the hindsight combination of components

selectively culled from the prior art to fit the parameters of the patented invention." See *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 48 USPQ2d 1321 (Fed. Cir. 1998). As the Action fails to satisfy the first of the requirements for a prima facie case of obviousness, the rejection is improper

b. No reasonable expectation of success

Even if one skilled in the relevant art were to combine the references, there is no reasonable expectation that the combination would be successful. Specifically, the body specifications of Krishnakumar, directed to a non wide-mouth container, would not be expected to work with the dome of Prevot. There is no reason to expect that the body or base of Krishnakumar would be sturdy enough to support the dome of Prevot, particularly when containers are stacked upon each other. The structures of a container body designed to support a non wide-mouth container as disclosed in Krishnakumar would be insufficient to support and accommodate the needs of a dome with a wide mouth as disclosed in Prevot. Thus, there is no reason to expect that the body or base of Krishnakumar would be sturdy enough to support the dome of Prevot, particularly when containers are stacked upon each other.

Furthermore, a skilled artisan would not expect that the dome of Prevot, in conjunction with the body and base of Krishnakumar, would be able to withstand the pressures of pasteurization, as pasteurizable containers must be able to withstand temperatures that exceed the temperatures of hot-fill processing. Also, due to the desire to minimize product weight and manufacturing costs, containers built for hot-fill do not have the needed bulk to withstand pasteurization. Hence, it is erroneous to assume that a container suited to hot-fill processing is also capable of enduring pasteurization. For at least these reasons, a person skilled in the relevant art would not believe the combination of Prevot and Krishnamar to be a successful one.

Accordingly, the Office Action fails to meet the second requirement for a prima facie case of obviousness and the rejection should be reversed.

B. Argument for claim 6

Claim 6 further recites that the filled and capped container is heated to a temperature in a range of at least 190-210° F for a period in the range of 5-20 minutes (Appellants' specification, page 5, lines 26-29). As discussed in the preceding section, neither Prevot nor Krishnakumar, either singly or in combination, satisfy this claim limitation. Specifically, Prevot does not assert that it is capable of withstanding these high temperatures, as hot-fill processing involves only temperatures as high as approximately 185° F, which is the official upper limit. Krishnakumar only discloses placing the container in a water bath at a maximum temperature of 76.6° C, which is approximately 180° F. (See Krishnakumar, Figure 2.) Further, Krishnakumar is not a wide-mouth container. As a result, the combination of references fails to meet all the limitations of claim 6 (see arguments above). Since Prevot and Krishnakumar do not teach, suggest, or disclose heating a container as recited by Applicant's claim 6, claim 6 is allowable over the references.

C. Argument for claim 20

Claim 20 includes the limitation that a diameter of the wide mouth opening is at least about 80% of a diameter of a cross-section of the container at the sidewall. Neither Prevot nor Krishnakumar disclose this claim limitation. Additionally, the combination of Prevot and Krishnakumar does not disclose a container having a wide-mouth with a diameter that is at least about 80% of the diameter of a cross-section of the container sidewall. Therefore, claim 20 is allowable over the references.

D. Argument for claims 9-19

Independent claim 9 and dependent claims 10-19 are directed to a method that includes pasteurization of a container that has been filled with a volatile food product and capped. The container of these claims has a sidewall that is stiffened against distortion, and the container can survive pasteurization without subjecting the base to undesirable distortion. As explained in the Appellants' specification at page 3, lines 3-6, "the sidewall grooves cooperate with the dome and base to stiffen the sidewall against undesirable distortion due to the swing from super-baric to sub-baric pressures within the container".

There is no discussion in Prevot of a sidewall and a base that interact to prevent undesirable distortion in the container. With respect to the disclosure of Krishnakumar, the specifications of the bottle of Krishnakumar can not be reasonably expected to support Appellants' wide-mouth bottle as claimed. Therefore, Prevot and Krishnakumar, either singly or in combination, do not disclose this claim limitation as recited in claim 9, and claim 9 is patentable over the references. Claims 10-19 are patentable at least for the reason that they depend from claim 9.

E. Argument for claim 10.

Claim 10 requires that the base be a "footed base". In contrast, Krishnakumar does not show a footed base. Further the Office Action does not specifically point out what element of Krishnakumar corresponds to Appellants' footed base. (See Krishnakumar, Fig. 8.) Prevot does not include any disclosure that is directed to a base. As a result, the combination of Prevot and Krishnakumar does not teach, suggest, or disclose the base as set forth in Appellants' claim 10, and claim 10 is patentable over the references.

F. Argument for claim 12

Claim 12 recites that the sidewall includes a plurality of vertically-spaced, circumferentially extending, inset grooves (11d) that are equally spaced and enable the sidewall to accommodate, without undesirable distortion, super-baric pressures experienced within the container during the heating step, and a swing from super-baric pressures to sub-baric pressures experienced within the container and the volatile food product cools to ambient temperature.

Prevot does not disclose a sidewall. Krishnakumar discloses hoop ribs 137 and 139. First, Appellants assert that the hoop ribs of Krishnakumar are not the inset grooves of claim 12. Second, the hoop ribs of Krishnakumar cannot meet the required claim limitation of enabling the sidewall to accommodate pressure changes without undesirable distortion. The inset grooves (11d) of the present invention are spaced throughout the sidewall, whereas hoops ribs 137 and 139 of Krishnakumar are only at the top and bottom of the sidewall. More importantly, Krishnakumar's hoop ribs are insufficient to accommodate the pressure changes that occur during heating and cooling of a wide-mouth container, and would be unable to prevent distortion of the sidewall. For these reasons, claim 12 is patentable over the combination of Prevot and Krishnakumar.

G. Argument for claim 15

Claim 15 is allowable for being dependent from claim 9, and for its further recited feature that the filled and capped container is heated to a temperature in the range of at least about 190-210° F for a period in a range of 5-20 minutes. Neither Prevot nor Krishnakumar disclose this claim limitation. Accordingly, claim 15 is patentable over the references.

H. Argument for claim 21

Claim 21 includes the additional limitation that a diameter of the wide mouth opening is at least about 80% of a diameter of a cross-section of the container at the sidewall. As discussed

above in section 7C, the cited references, either singly or in combination, do not disclose this claim limitation. Therefore, claim 21 is patentable over the references.

(8) CONCLUSION

For the foregoing reasons, it is respectfully submitted that claims 3-21 are patentable over Prevot in view of Krishnamkumar. Accordingly, the Examiner's rejection of these claims should be reversed.

Respectfully submitted,

August 9, 2006

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(9) CLAIM APPENDIX

Listing of the Claims:

Claims 1-2 canceled.

Claim 3 (previously presented): An energy-efficient method of packaging a food product, comprising the steps of:

selecting a blow-molded PET plastic container having a sidewall with a plurality of peripheral vertically-spaced grooves, a dome located above said sidewall having a blown, wide-mouth opening adapted to receive a sealed closure, a footed base below said sidewall, an upper label bumper extending around the upper end of said sidewall subjacent said dome, a lower label bumper extending around the lower end of said sidewall superadjacent said base;

hot-filling the container with said food product;

capping the filled container;

heating the filled and capped container for a time at a temperature sufficient to pasteurize said food product; and

cooling the pasteurized filled and capped container to ambient temperature.

Claim 4 (original): The method according to claim 3 wherein said food product is a volatile vegetable in an aqueous medium.

Claim 5 (original): The method according to claim 4 wherein said volatile vegetable is selected from the group consisting of: pickles, relish, sauerkraut and artichokes.

Claim 6 (original): The method according to claim 3 wherein said filled and capped container is heated to a temperature in a range of at least about 190 - 210°F for a period in a range of 5 - 20 minutes.

Claim 7 (original): The method according to claim 3 wherein said hot-filling steps occur at a temperature of at least about 180°F.

Claim 8 (original): The method according to claim 3 wherein the container is at ambient temperature prior to hot-filling.

Claim 9 (previously presented): An energy-efficient method of packaging a volatile food product that requires pasteurization at elevated temperatures after the food product is packaged in a container that has been filled and capped, comprising the steps of:

hot-filling a blow-molded plastic container with said volatile food product at a temperature of at least 180°F, said container having a sidewall stiffened against distortion, a dome located above said sidewall and having an opening adapted to receive a sealed closure, a base located below said sidewall, an upper label bumper extending around an upper end of said sidewall subjacent said dome, and a lower label bumper extending around a lower end of said sidewall superadjacent said base;

capping said container immediately after said hot-filling step;

heating said container and packaged volatile food product after said capping step to a temperature in a range of at least about 190-210°F for a time sufficient to pasteurize said food product without subjecting the base to undesirable distortion; and cooling said container and packaged volatile food product after said heating step to ambient temperature.

Claim 10 (previously presented): A method according to claim 9, wherein said base of said container is a pressure-resistant footed base that withstands super-baric pressures experienced within said container after said container is hot-filled, capped and heated and that withstands a swing from super-baric pressures to sub-baric pressures experienced within said container as said volatile food product cools to ambient temperature.

Claim 11 (previously presented): A method according to claim 10, wherein said base has a plurality of radially extending ribs that extend outwardly from adjacent a longitudinal axis of said container toward an outer surface of said base, and wherein said ribs rigidify said base by resisting flexural movement of said base during said hot-filling, heating and cooling steps.

Claim 12 (previously presented): A method according to claim 11, wherein said sidewall is cylindrical except for a plurality of vertically-spaced, circumferentially-extending, inset grooves, said grooves having equal spacing therebetween and enable side sidewall of said container to accommodate, without undesirable distortion, super-baric pressures experienced within said container during said heating step and a swing from super-baric pressures to sub-

baric pressures experienced within said container as said volatile food product cools to ambient temperature.

Claim 13 (previously presented): The method according to claim 12, wherein said food product is a volatile vegetable in an aqueous medium.

Claim 14 (previously presented): The method according to claim 13, wherein said volatile vegetable is selected from the group consisting of: pickles, relish, sauerkraut and artichokes.

Claim 15 previously presented): The method according to claim 14, wherein during said heating step said container and packaged volatile food product is heated to a temperature in a range of at least about 190-210°F for a period in a range of about 5 to 20 minutes.

Claim 16 (previously presented): A method according to claim 15, wherein said opening is a wide mouth opening having a diameter sufficient to afford access to and withdrawal of said food product by means of a conventional item of tableware.

Claim 17 (previously presented): A method according to claim 16, wherein said sidewall of said blow molded plastic container has a crystallinity in excess of 25%.

Claim 18 (previously presented): A method according to claim 17, wherein said wide mouth opening of said blow molded plastic container is defined by blow molded, threaded neck.

Claim 19 (previously presented): A method according to claim 18, wherein said container is made of polyethylene terephthalate (PET).

Claim 20 (previously presented): The method according to claim 3, wherein a diameter of the wide-mouth opening is at least about 80% of a diameter of a cross-section of the container at the sidewall.

Claim 21 (previously presented): The method according to claim 9, wherein a diameter of the opening is at least about 80% of a diameter of a cross-section of the container at the sidewall.

IX. Evidence Appendix

None.

X. Related Proceedings Appendix

None